



Federal Communications Commission
Washington, D.C. 20554

DA 02-476

February 28, 2002

Mr. Walter Steimel, Jr., Esq.
Counsel for Red Hot Radio, G.P.
Greenberg Traurig
800 Connecticut Avenue, N.W., Suite 500
Washington, D.C.

Re: Eligibility Status of Red Hot Radio

Dear Mr. Steimel:

This letter responds to the Petition filed on behalf of your client, Red Hot Radio ("RHR")¹ seeking reconsideration of the January 3, 2001, *Election PN*,² which announced the date by which those licensees eligible to participate in the 218-219 MHz service restructuring plan were required to choose a restructuring option.³ The *Election PN* also contained a list of those licensees eligible to participate in the restructuring plan.⁴ Although RHR had been previously notified that it was not eligible to participate in the 218-219 MHz restructuring plan,⁵ RHR's Petition seeks reconsideration of its omission from the list contained in the *Election PN*. For the reasons set forth below, we dismiss RHR's Petition.

¹ In the Matter of Wireless Telecommunications Bureau Announces Revised Election Date and Amended Eligibility List for 218-219 MHz Service, Petition for Reconsideration, filed on Feb. 2, 2001 ("Petition").

² "Wireless Telecommunications Bureau Announces Revised Election Data and Amends Eligibility List for 218-219 MHz Service," *Public Notice*, 16 FCC Rcd 5937 (2001) ("*Election PN*").

³ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999) ("*218-219 MHz Order*").

⁴ *Election PN*, 16 FCC Rcd 5937 (2001) ("*Election PN*").

⁵ RHR was sent a letter indicating that it was not eligible to participate in the restructuring plan on January 6, 2000. Letter to Walter Steimel, Jr., Red Hot Radio Counsel, from Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, Wireless Telecommunications Bureau, Federal Communications Commission, dated January 6, 2000 ("*RHR Ineligibility Letter*"). Additionally, the list of Eligible Licensees was initially published in an April 20, 2000 public notice. Implementation Procedures For The Report and Order and Memorandum Opinion and Order Addressing The 218-219 MHz Services (Formerly Known as Interactive Video and Date Services (IVDS)), *Public Notice*, 15 FCC Rcd. 7329, Appendix B (2000) ("*Implementation PN*") (explaining implementation procedures relating to the restructuring plan).

I. Background

In September of 1994, RHR was the winning bidder for three IVDS licenses at auction.⁶ As a small business, RHR was eligible to participate in the Federal Communications Commission's ("Commission") installment payment plan, which conditioned licenses upon full and timely performance of all installment payment obligations.⁷ RHR's first three required installment payments were owed in the following amounts: January 5, 1996 payment due in the amount of \$1,651.88; March 31, 1996 payment due in the amount of \$3,712.20; and June 30, 1996 payment due in the amount of \$3,712.20.⁸ RHR's filings evidence payments to the Commission in the amount of \$7,419.65.⁹ These payments satisfied RHR's January 5, 1996 and March 30, 1996 installment payment obligations, but only partially satisfied RHR's June 30, 1996 installment obligation.¹⁰

At the time of RHR's June 30, 1996 installment payment obligation, the Commission's rules provided that in the event a license holder is more than ninety days delinquent on any installment payment, its license would cancel automatically.¹¹ If, during the first ninety days following any missed installment payment, a licensee required financial assistance, the rules allowed the licensee to request that the Commission grant a grace period of three to six months,

⁶ "Interactive Video And Data Service (IVDS) Applications Accepted For Filing," *Public Notice*, 9 FCC Rcd 6227 (1994).

⁷ 47 C.F.R. § 1.2110(e)(4)(iii) (1994). Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying By Installment Payments, *Public Notice*, 10 FCC Rcd. 10724 (1995) (WTB) ("IVDS Licensees that elect to pay for their license in installments will have their license conditioned upon full and timely performance of all installment payment obligations. The Commission's rules provide that a licensee will be deemed in default on its installment payments if it is more than 90 days delinquent in making a payment to the government.").

⁸ Initial installment payments for all IVDS licensees were stayed by an Order issued on September 22, 1995. In the Matter of Interactive Video and Data Service (IVDS) Licenses, Request for Stay to Postpone Commencement of Installment Payment Program, *Order*, 11 FCC Rcd. 3031 (1995). The stay was lifted and initial installment payments were ordered to resume on January 5, 1996. In the Matter of Interactive Video and Data Service (IVDS) Licenses, Various Requests by Auction Winners, *Order*, 11 FCC Rcd. 1282 (1995). The new installment payment schedule was clarified by two letters sent to all IVDS licensees on March 10, 1996 and March 29, 1996. Notice To IVDS Licensees, dated March 10, 1996 from Regina Dorsey, Chief, Billings and Collection Branch, Federal Communications Commission; Letter dated March 29, 1996 from Regina Dorsey, Chief, Billings and Collection Branch, Federal Communications Commission.

⁹ Petition Attachment: "Additional Filings in Support of Petition" (RHR submitted a payment on April 4, 1996 in the amount of \$3,712.20 and a payment on July 1, 1996 in the amount of \$3,707.45).

¹⁰ RHR still owed \$1,656.63 on the June 30th installment payment.

¹¹ 47 C.F.R. § 1.2110(e)(4) (1994).

during which no installment payments need be made.¹² Thus, RHR had until September 28, 1996, to either submit the full amount of the June 30, 1996 installment payment or file a grace period request. RHR did not file a timely grace period request within 90 days of the June 30, 1996 obligation.¹³

On September 10, 1999, the Commission issued the *218-219 MHz Order*, which, among other measures, adopted a financial restructuring plan for “Eligible Licensees.”¹⁴ Eligible Licensees included those that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules.¹⁵ “Ineligible Entities” were those that had made second down payments and: (i) made some installment payments, but were not current in their installment payments as of March 16, 1998, and did not have a grace period request on file in conformance with the former rules; or (ii) entities that never made any installment payments and did not have a timely filed grace period request on file.¹⁶ Ineligible Entities were not entitled to participate in the restructuring plan for the 218-219 MHz Service as they lost their licenses through default.¹⁷ However, Ineligible Entities were

¹² 47 C.F.R. § 1.2110(e)(4)(ii) (1994).

¹³ RHR does not offer any substantive indication that it filed a timely grace period request with respect to its June 30, 1996 obligation. Instead, RHR offers vague representations in its Petition that it was aware of its payment obligations and that it filed timely grace period requests. Petition at 1 (alleging that RHR made all required installment payments or request grace periods as necessary); Declaration of Marjorie K. Connor, attached to Petition, dated February 2, 2001 (alleging that she prepare several letters to the Bureau to request grant of various grace periods). However, the record fails to support RHR’s contention. Rather, documents submitted as attachments to RHR’s Petition suggest that RHR did not recognize that it had not paid the full amount of its June 30, 1996 installment payment. Letter from Marjorie K. Conner, General Partner, Red Hot Radio, to William F. Caton, Secretary, dated December 31, 1996 (seeking a grace period for the September 30, 1996 installment payment and making no mention of the June 30, 1996 installment payment. This letter itself was untimely as to the September 30, 1996 installment payment); Letter from Ronnie London, Hunton & Williams, to A. Jerome Fowlkes, Federal Communications Commission, dated April 1, 1997 (noting that RHR had filed a grace period request on December 31, 1996 with respect to the September 30, 1996 installment payment, but again failing to mention the any prior grace period requests). Further, in its petition, RHR does not specifically allege that it filed a grace period request with respect to the June 30, 1996 installment payment.

¹⁴ *218-219 MHz Order*, 15 FCC Rcd at 1506, 1517 ¶¶ 15, 31.

¹⁵ *Id.* at 1520 ¶ 37.

¹⁶ *Id.* at 1520 ¶ 38.

¹⁷ *Id.* at 1518 ¶ 33 (citing 47 C.F.R. § 1.2110 (1994)); *see also* Letter to E. Ashton Johnston, Esq., Counsel for Vista Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd. 12430 (2001); Letter to J. Jeffrey Craven, Esq., Counsel for IVIDCO, L.L.C., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd. 7236 (2001); Letter to Fred D. Middleton, Jr., President, P.A.W., Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd. 3473 (2001).

granted debt forgiveness for any outstanding balances owed and were informed that their previously paid installments would be refunded.¹⁸

In a letter dated January 6, 2000, RHR was notified that it was not eligible to participate in the restructuring plan.¹⁹ RHR did not seek reconsideration of either the *218-219 MHz Order*²⁰ or the January 6, 2000 *RHR Ineligibility Letter*. Instead, more than four years after its June 30, 1996 installment payment was due, and nearly twelve months after notification via the *RHR Ineligibility Letter*, RHR submitted the instant Petition.²¹

II. Discussion

By statute, Congress limited the Commission's jurisdiction to review petitions for reconsideration to those filed within a specific time period.²² Section 1.106(f) of the Commission's rules implements this statutory mandate and requires that a petition for reconsideration be filed within thirty days from the date of public notice of the Commission's action.²³ As stated above, our records indicate that RHR failed to make full payment on its June 30, 1996 installment obligation and failed to file a timely grace period request for the licenses by September 28, 1996. Accordingly, the licenses automatically cancelled on September 29, 1996.²⁴ RHR did not file a timely challenge to this automatic cancellation.²⁵ RHR ignores the untimely nature of its Petition and instead argues that the *Election PN* constitutes a "grant" of

¹⁸ *218-219 MHz Order*, 15 FCC Rcd at 1520 ¶ 38; Implementation Procedures For The Report And Order And Memorandum Opinion And Order Addressing the 218-219 MHz Services (Formerly Known As Interactive Video And Data Services (IVDS)), *Public Notice*, 15 FCC Rcd 7329 (WTB 2000) (noting that the Department of Justice authorized the reduction of debt owed to the United States in accordance with the debt relief provisions of the *218-219 MHz Order*); *Election PN*, 16 FCC Rcd. 5937.

¹⁹ *RHR Ineligibility Letter*. As noted in note 5 above, in April of 2000, the Commission also published a list of Eligible Licensees. *Implementation PN*, 15 FCC Rcd. 7329, Appendix B

²⁰ The *218-219 MHz Order* was released on September 10, 1999. *218-219 MHz Order*, 15 FCC Rcd 1497.

²¹ Notwithstanding the automatic cancellation of its licenses on September 29, 1996, the *218-219 MHz Order*, the *Implementation PN*, and the *RHR Ineligibility letter*, RHR filed a restructuring choice and chose prepayment. That filing was noted but not accepted as an election by the Commission "Wireless Telecommunications Bureau Announces The Elections For The 218-219 MHz Service," *Public Notice*, 16 FCC Rcd. 5901 (2001).

²² 47 U.S.C. § 405 (limiting the Commission's power to consider petitions for reconsideration to those filed within 30 days from public notice of the order, decision, report or action complained of); *see also Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (1986) (narrowly construing judicially created "extraordinary circumstances" exception to statutory time limit for filing petitions for reconsideration).

²³ 47 C.F.R. § 1.106(f).

²⁴ 47 C.F.R. § 1.2110 (1994).

²⁵ 47 C.F.R. § 1.2110(e)(4) (1994).

eligibility.²⁶ Although in some instances it may be proper for a party to challenge a Commission public notice that establishes or denies rights,²⁷ the *Election PN* was not an order or action of the Commission (or the Wireless Telecommunications Bureau) canceling RHR's licenses. Rather, the *Election PN* was issued to announce the date by which Eligible Licensees were required to choose a restructuring option.²⁸ Thus, RHR has failed to establish that its petition for reconsideration is timely. Accordingly, we dismiss RHR's petition pursuant to section 1.106(f) of our rules.

Not only is RHR's Petition untimely under section 1.106(f) of the Commission's rules, it is also barred by the doctrine of waiver, *i.e.*, a party with sufficient opportunity to raise a challenge in a timely manner, but who fails to do so, is deemed to have waived the challenge and is precluded from raising it subsequently.²⁹ RHR was obligated under the Commission's rules to bring any dispute over the automatic cancellation of its licenses to the Commission's attention in a timely manner. RHR did not file a grace period request before RHR's licenses automatically canceled.³⁰ RHR, also, did not file a petition for reconsideration after the licenses automatically cancelled. Further, RHR also failed to bring any concerns regarding the status of its licenses to the Commission's attention when other events reasonably should have prompted inquiry, *i.e.*, release of the *218-219 MHz Order*,³¹ RHR's receipt of the *RHR Ineligibility Letter*,³² and issuance of the *Implementation PN*.³³ In light of this record of inaction, it is clear that RHR has waived its challenge to the automatic cancellation of its licenses.

²⁶ See generally Petition (wherein RHR argues that the *Election PN* constitutes a "grant" of eligibility).

²⁷ See *Nextwave Order on Recon.*, 15 FCC Rcd. 17500, ¶ 10.

²⁸ *Election PN*, 16 FCC Rcd. 5937 ("On December 28, 1999, a Preliminary Implementation Procedures Public Notice was issued which announced that Eligible Licensees had to make their elections by 7 p.m., February 29, 2000. In order to allow sufficient time to address the issues raised in the various petitions for reconsideration of the *218-219 MHz Order*, the Commission decided to change the Election Date to the last business day of the first full month after an Order on the petitions for reconsideration was released. On December 13, 2000, the Commission released an Order addressing the aforementioned petitions for reconsideration. Accordingly, Eligible Licensees must make their elections by 7 p.m., Wednesday, January 31, 2001.") (citations omitted).

²⁹ *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1256 (D.C. Cir. 1996); *Northwest Indiana Telephone Company, Inc. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989); In the Matter of Weblink Wireless, Inc., *Order*, DA 01-1143, ¶ 6 (rel. May 3, 2001) ("*Weblink*"); In the Matter of Community Teleplay, Inc., et. al., *Order*, 13 FCC Rcd 12426, 12428 ¶ 5 (WTB 1998) ("*Community Teleplay*").

³⁰ See *supra* fn. 13.

³¹ *218-219 MHz Order*, 15 FCC Rcd. 1497 (rel. September 10, 1998).

³² *RHR Ineligibility Letter*, issued January 6, 2000.

³³ *Implementation PN*, 15 FCC Rcd. 7329 (2000).

Mr. Walter Steimel, Jr.
February 26, 2002

III. Conclusion

For the foregoing reasons, RHR's Petition seeking reconsideration filed on February 2, 2001, is dismissed.

This action is taken pursuant to sections 1, 4(i), 4(j), 303(r), 309(j) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j), 405 and the authority delegated pursuant to section 0.331³⁴ of the Commission's Rules.

Sincerely,

Margaret Wiener, Chief
Auctions and Industry Analysis Division

³⁴ 47 C.F.R. § 0.331.